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No. 84-1746

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

KN ENERGY, INC.,

Petitioner,

v.

THE GREAT WESTERN SUGAR CO.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Colorado

BRIEF IN OPPOSITION OF THE GREAT WESTERN SUGAR COMPANY

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QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission (Commission) has exclusive jurisdiction, such as to oust a state court of jurisdiction, to adjudicate a suit for breach of contract against a natural gas company subject to regulation under the Natural Gas Act, arising from the gas company's unilateral change in its method of interrupting delivery of gas, where the gas company was not suffering from a gas supply shortage and had not implemented a curtailment plan approved by the Commission.

2. Whether, in a suit for breach of contract brought against a natural gas company subject to regulation under the Natural Gas Act, the Colorado courts abused their discretion in declining to refer any questions to the Commission under the doctrine of primary jurisdiction, where the courts determined that they could interpret applicable certificates of public convenience and necessity, Commission policy orders, and the gas company's tariffs solely as a matter of law.

3. Whether an award of damages against a gas company resulting from its breach of contract with a customer constitutes a prohibited undue preference or a violation of the filed rate doctrine.[1]

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[1]The statement required by Rule 28.1 is set out in the Appendix pp. 1a-2a. Contrary to KN's assertion (Pet., p. 1, fn. 2), neither the Commission nor the Interstate Natural Gas Association of America (INGAA) participated as parties in the Supreme Court of Colorado. The Commission did not file a petition for a writ of certiorari; nor did INGAA file a petition to intervene. Rather, both filed only *amicus* briefs in support of certiorari. Neither filed a brief on the merits once the Colorado Supreme Court excluded the primary jurisdiction question from its grant of certiorari.

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BRIEF IN OPPOSITION OF THE GREAT WESTERN SUGAR COMPANY

OPINIONS BELOW

The opinion of the Colorado Supreme Court (Pet. App., pp. 1a-32a) is unreported. The opinion of the Colorado Court of Appeals (Pet. App., pp. 33a-56a) is reported at 661 P.2d 684 (1982).

JURISDICTION

The opinion of the Colorado Supreme Court was issued January 14, 1985 (Pet. App., p. 1a). Petitioner's timely application for rehearing was denied on February 6, 1985. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATEMENT OF FACTS

Background: Petitioner, KN Energy, Inc. (KN),[2] transports and sells natural gas in interstate commerce and, as such, is subject to regulation by the Federal Energy Regulatory Commission,[3] under the Natural Gas Act, 15 U.S.C. § 717 *et seq.* Respondent, The Great Western Sugar Company (GW), has been engaged in the business of processing sugar beets into sugar. GW purchased natural gas directly from KN for its factories at Ovid and Sterling, Colorado and Scottsbluff, Nebraska. For its plant at Goodland, Kansas, GW purchased gas from the Peoples Division of Northern Natural Gas Company (Northern) which, in turn, was supplied by KN.

Pursuant to Commission certificates of public convenience and necessity (certificates) and contracts which date back to 1955 and which were renewed throughout the relevant time period without material change, KN sold natural gas to GW under interruptible contract provisions which provided in pertinent part:

> KN . . . in its absolute discretion and without liability to Buyer for damages or otherwise, shall have the right to . . . interrupt . . . delivery of gas to Buyer hereunder as and whenever from time to time KN is required to do so in order to meet the demands of domestic and commercial users or other users having a higher priority of service. (Pet. App., p. 3a).

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[2]Formerly Kansas-Nebraska Natural Gas Company, Inc.

[3]We refer to the Federal Energy Regulatory Commission and its predecessor the Federal Power Commission as the Commission.

Whenever service was "interrupted" under this provision, GW was required to use more expensive fuel oil in its factories.

From 1955 until November 7, 1973, KN determined when to interrupt under these contract provisions by comparing its anticipated demand over the next 24 to 36 hours with its anticipated supply, including all gas available from its storage facilities.[4] As a result, from the time that its first storage facility commenced operations in 1964 to November 7, 1973, KN used storage gas as well as flowing gas to meet the needs of all of its customers, interruptible as well as firm. Even when the comparison indicated a need for some interruption, KN would still deliver gas to as many interruptible customers as possible. The Colorado courts called this KN's "historical 24 to 36 hour analysis." See Pet. App., p. 5a.

On November 7, 1973, KN abandoned its historical 24 to 36 hour analysis without seeking to amend its contracts with GW and without seeking the approval or authorization of the Commission. See Pet. App., p. 5a. KN unilaterally embarked upon a new policy for delivering gas to interruptible customers ("the storage withdrawal interruption policy"), under which gas deliveries to interruptible customers were cut off whenever, and for as long as, KN was withdrawing gas from storage, even when KN could otherwise have served those customers by drawing on all sources of supply as it had traditionally done under the historical 24 to 36 hour analysis.

Under the historical 24 to 36 hour analysis, KN had interrupted service to GW on an average of about 5 days per

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[4]KN's first storage facility (Huntsman) was authorized by a Commission certificate issued in 1963. *Kansas-Nebraska Natural Gas Co., Inc.*, 30 FPC 356 (1963).

"campaign," the approximately four month period during which sugar beets are processed into sugar. Under the storage withdrawal interruption policy, those interruptions increased dramatically to an average of about 50 per campaign during the 6 year period at issue in the Colorado lawsuit. KN readily admitted in the Colorado courts that this increase resulted directly from its adoption of the storage withdrawal interruption policy.

Almost two years after adopting the new policy, on August 29, 1975, KN unilaterally filed with the Commission tariff sheets which stated (Pet. App., pp. 23a-25a):

> Seller shall not be required to remove gas from gas storage reservoirs for delivery to consumers served by Seller on an interruptible basis or under interruptible service rate schedules in this Tariff.

The Commission suspended these tariff provisions for the statutory period of five months and then permitted them to become effective as of March 14, 1976, pending final Commission approval. Pet. App., pp. 38a-39a.

A hearing on the lawfulness of these provisions (along with further tariff sheets filed in December 1976 establishing priorities of service) was conducted in Commission Docket No. RP76-90. After extensive proceedings in that Docket, including an Initial Decision of the Administrative Law Judge finding KN's tariff to be unlawful, 6 FERC ¶ 63,055 (1979), the Commission by order issued November 2, 1981, 17 FERC ¶ 61,102 (1981), accepted a settlement by the parties terminating the proceeding. In accepting the settlement, the Commission twice expressly pointed out that:

> The approval of this Stipulation and Agreement shall not constitute approval of or precedent regarding any

> principle or issue in these proceedings (17 FERC at pp. 61208-09, 61210).

When the issue of KN's storage withdrawal interruption policy arose in Docket No. RP76-90, the Administrative Law Judge concluded that the Commission had not previously authorized the policy and that the courts would have to resolve its propriety:

> As for the pipeline's claim that it has been cutting off service to some customers for substantial periods of time even before now, it has certainly not done this pursuant to authority granted by the FPC. Instead, the pipeline apparently has proceeded on the basis of contracts or a tariff on file with a state agency allowing it to cut off service to "interruptible" customers. It remains for the Courts to decide whether these contracts or the state tariff actually give the pipeline unlimited authority, as it seems to claim, to cut off service indefinitely to these interruptible customers. Certainly on one occasion, at least, it was ruled that the pipeline lacked such authority.

58 FPC 2899, 2905-06 (1977) (footnote and citation omitted). Although exceptions were taken from this Initial Decision, *see* 5 U.S.C. §557, KN, GW, and the Commission's Staff did not take issue with the findings quoted above; and although the Commission reversed other portions of that Decision, 58 FPC 2890 (1977), the Commission, which had the power to reverse or modify those findings on its own motion, 5 U.S.C. §557(b), did not do so. GW accordingly sued KN in the Colorado courts.

Proceedings In Colorado Courts: GW filed its complaint against KN in January 1978, claiming that KN's unilateral abandonment of its historical 24 to 36 hour analysis in favor of the storage withdrawal interruption policy constituted a

breach of KN's contracts with GW. Pet. App., p. 6a.[5] On May 2, 1978, KN moved the trial court to refer portions of the dispute to the Commission under the doctrine of primary jurisdiction. Pet. App., p. 6a. The trial court denied this motion on August 11, 1978, and subsequently also denied KN's motions to reconsider.[6]

Thereafter, GW moved for partial summary judgment on the ground that KN's November 1973 unilateral adoption of the storage withdrawal interruption policy constituted a breach of KN's contracts for service to GW's Ovid, Sterling, and Scottsbluff factories. Pet. App., p. 6a. KN also moved for summary judgment, asserting that certain Commission tariffs, certificates, and orders required KN's change of policy. Pet. App., p. 7a.[7] The trial court granted GW's motion but denied KN's motion, ruling that the applicable

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[5]Although GW's complaint as filed also alleged fraud and named Northern as a defendant, the issues before the Colorado Supreme Court involved only contract claims by GW against KN.

[6]KN filed motions for reconsideration of the primary jurisdiction issue in February and April 1979. The Commission filed an *amicus* brief supporting the latter motion. However, the trial court denied both motions. In June 1979, two weeks before the scheduled trial date, KN sought a writ of prohibition from the Colorado Supreme Court, arguing that the trial court erred in failing to refer the matter to the Commission. This petition was denied. Also in June 1979, KN sued GW in the United States District Court for the District of Nebraska, Docket No. CV 79-L-164, seeking to enjoin trial by virtue of the trial court's alleged error on the primary jurisdiction issue. KN's Motion for a Temporary Restraining Order was denied shortly thereafter, and the case went to trial as scheduled on July 2, 1979.

[7]Despite having argued previously that only the Commission could interpret these tariffs, certificates, and orders, KN advanced no reason (either its motion for summary judgment or in its memorandum opposing GW's motion) why the trial court was incapable of reviewing those agency directives and interpreting their plain language as a matter of law.

contracts did not allow KN unilaterally to withhold any sources of supply from service to GW and that this obligation was not modified in any way by the various Commission tariffs, certificates, and orders cited by KN. Pet. App., p. 7a.[8]

A jury trial was held on the issue of GW's damages after that summary judgment ruling, as well as a second ruling affecting GW's Goodland plant. Pet. App., pp. 7a, 46a-48a.[9] The jury awarded GW damages in excess of $1,000,000 for its four plants. Pet. App., p. 8a.[10]

Although KN has suggested that it was simply protecting its high priority customers by adopting the storage with-

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[8]As a separate basis for holding that KN had breached its contracts, the trial court also determined that KN was obligated to employ the same method it had used for 18 years before November 1973 in determining when to interrupt. Pet. App., p. 44a. This ruling was based in part on depositions of KN's personnel as to how they historically had acted under contract with GW, and in part on KN's express representations to GW about using storage gas in serving GW's needs.

[9]The trial court held that by interrupting service pursuant to the storage withdrawal interruption policy, KN had breached the service agreement under which KN supplied gas to Northern for ultimate distribution, among others, to the Goodland plant, and that GW could be a third party beneficiary of that service agreement, Pet. App., pp. 7a, 46a. The jury specifically found that KN and Northern intended to confer benefits on GW among others. Pet. App., p. 46a. KN does not contend here that these factual findings were erroneous.

[10]Contrary to KN's assertion (Pet., pp. 15-16), the trial court (as well as the Colorado appellate courts) recognized KN's contractual discretion to interrupt service to GW under appropriate circumstances, and permitted KN to present evidence justifying any interruption of service in an effort to reduce GW's damages (see Pet. App., pp. 54a-55a). KN, however, did not introduce any evidence justifying any interruption. *Id.*

drawal interruption policy, the evidence presented to the trial court and jury—out of the mouths of KN's own executives and directors—overwhelmingly showed that despite some declines in reserves and deliverability, KN had ample gas supplies to continue operating under the historical 24 to 36 hour analysis; but that "economics were a factor" in KN's unilateral adoption of the new policy because interruptible sales were "thin-margin sales" and storage gas was "expensive gas."[11]

Following denial of their post-trial motions, both KN and GW took appeals to the Colorado Court of Appeals. Pet. App., pp. 33a-56a. In its opinion, the Court of Appeals *inter alia* rejected KN's contention, supported by the *amicus* brief filed by the Commission, that the trial court had abused its discretion by failing to refer certain issues to the Commission under the doctrine of primary jurisdiction. The Court reasoned that the issues presented were common law contract claims, and that the agency directives cited by KN could be interpreted as a matter of law. Pet. App., p. 42a.

The Court of Appeals also affirmed the trial court's holding that in switching from the historical 24 to 36 hour analysis to the storage withdrawal interruption policy, KN

[11]*See also Kansas-Nebraska Natural Gas Co., Inc.*, 59 FPC 854, 858-59 (1976), *aff'd*, 59 FPC 851 (1977) (precluding KN from abandoning service to its lowest priority customers because it "had the unquestioned ability to meet the full requirements of all its customers for many years to come." The Administrative Law Judge there concluded that KN's abandonment application was no more than a thinly disguised effort to reduce sales with a low profit margin); *Kansas-Nebraska Natural Gas Co., Inc.*, 6 FERC ¶ 63,055 at 65,322 (1979) (KN's standby curtailment plan found unlawful in that KN had ample gas supplies and was using the plan to discriminate against its interruptible customers. The Administrative Law Judge, alluding to the fact that interruptible customers furnish less revenue to KN than the firm users, concluded that the plan was "motivated by Kansas-Nebraska's pocketbook").

had breached its contracts with GW. Pet. App., pp. 43a-45a. Further, it ruled that none of the Commission directives relied on by KN authorized or required KN's change in policy. Pet. App., pp. 37a-38a, 45a.[12]

Following the Court of Appeals' denial of KN's application for rehearing on July 15, 1982, KN on September 16, 1982 filed a petition for a writ of certiorari with the Supreme Court of Colorado urging error by the Court of Appeals in declining to direct a reference to the Commission under the doctrine of primary jurisdiction and in making certain substantive rulings. The Commission and INGAA filed *amicus* briefs supporting certiorari on the primary jurisdiction question. *See* n.1, *supra*. The Colorado Supreme Court on March 21, 1983 denied certiorari on the primary jurisdiction question, but granted certiorari on the substantive questions raised in KN's petition.

By opinion issued January 14, 1985, Pet. App., pp. 1a-32a, the Colorado Supreme Court affirmed the decision of the Court of Appeals, holding *inter alia* that the various Commission directives relied on by KN neither imposed an obligation requiring the storage withdrawal interruption policy nor immunized KN from contract liability. Pet. App., pp. 15a-25a.[13]

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[12]On GW's own appeal, the Court of Appeals held that KN did not present any evidence justifying any of its interruptions to GW (*see* n.10 *supra*), and that GW was therefore entitled to a directed verdict on the issue of its damages for each of the roughly 250 days on which interruptions occurred during the relevant time period. Pet. App., pp. 54a-56a.

[13]KN alludes (Pet., p. 10, fn.12) to a declaratory judgment proceeding which it initiated with the Commission on August 5, 1982, after the Colorado Court of Appeals' denial of rehearing and before KN filed its certiorari petition with the Colorado Supreme Court. Since KN has alluded to that proceeding, it is only appropriate to note that

ARGUMENT

No question of general importance is presented. This is a common law breach of contract dispute between a gas company and one of its customers. While the gas company invoked federal law in its defense, the Colorado courts were competent to apply and interpret that federal law, and did so correctly. The petition for a writ of certiorari should be denied.

I. The Commission Does Not Have "Exclusive And Continuing Jurisdiction" Over This Breach Of Contract Dispute.

Despite KN's conclusory argument (Pet., pp. 13-15) about the Commission's "exclusive and continuing jurisdiction", this Court has already held that state courts have jurisdiction to resolve breach of contract disputes involving the sale of natural gas:

> The rights as asserted by [the plaintiff] are traditional common law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas.

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based on the separate record there made, the Administrative Law Judge on February 27, 1985 issued his Initial Decision agreeing in *every* substantive respect with the findings and conclusions of the Colorado courts. 30 FERC ¶ 63,049 (1985). But both because the agency record is distinct from the record made in the Colorado proceeding and because the Colorado courts correctly exercised their discretion not to refer any aspect of the dispute to the Commission, GW submits that the ongoing Commission declaratory judgment proceeding, *regardless of its outcome*, is of no moment for purposes of this Court's consideration of KN's Petition.

Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656, 663 (1961).[14]

In the natural gas industry, arrangements are "established initially by contract," *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 339 (1956), the terms of which cannot be abrogated unilaterally by the gas company. *Id.*, at 339-40. The Commission's power to modify a gas company's contractual obligations (and thereby frustrate "the integrity of contracts") is limited to those special circumstances where it is "necessary in the public interest." *Id.*, at 344.

To be sure, curtailment is one situation where the courts have considered it "necessary in the public interest" for the Commission to abrogate inconsistent contractual obligations. *Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972). When a gas company is experiencing curtailment, it is suffering from an "inadequate supply of natural gas", *id.*, at 623; *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326 (1976), and the Commission therefore had the

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[14]*See also Pan American Petroleum Corp. v. Kansas-Nebraska Natural Gas Co., Inc.*, 297 F.2d 561, 567-68 (8th Cir.), *cert. denied*, 370 U.S. 937 (1962), where KN convinced the courts that the Commission did not have "exclusive jurisdiction" but, rather, that the courts had jurisdiction over breach of contract disputes involving the sale of natural gas because "the Natural Gas Act does not give the right to gas companies to abrogate their contract obligations." Moreover, despite its current claim that the Commission has "exclusive and continuing jurisdiction" over all issues involving the transportation of natural gas, KN invoked the courts in suing one of its interruptible customers to obtain a declaratory judgment as to its rights and obligations in transporting gas to that customer. *Kansas-Nebraska Natural Gas Co., Inc. v. Consumers Public Power Dist.*, 179 Neb. 687, 140 NW.2d 10 (1966).

authority to devise a reasonable way to ration those limited gas supplies. *Id.; see also* Order 467B, 49 FPC 583 (1973).

In contrast, the Commission has, time and again, recognized that KN did not experience any gas supply shortage during the relevant time period. *E.g., Kansas-Nebraska Natural Gas Co., Inc.*, Docket No. CP74-299, 59 FPC 851, 852-53 (1977); *Kansas-Nebraska Natural Gas Co., Inc.*, Docket No. RP76-90, 59 FPC 1776, 1780-81 (1977); *see also* 59 FPC 854 (1976); 58 FPC 2899 (1977); 6 FERC ¶ 63,055 (1979); and 30 FERC ¶ 63,049 (1985) (holding that KN had adequate gas supplies, that indeed KN had perhaps the best gas supply of any gas company in the Nation, and that KN was not experiencing curtailment at any time during the relevant time period).[15]

Nor is the Commission's jurisdiction over this dispute somehow "exclusive" merely because it issued certain direc-

[15]Although KN did file a curtailment plan in 1976, that plan was never approved by the Commission. *Kansas-Nebraska Natural Gas Co., Inc.*, 17 FERC ¶ 61,102 (1981); 6 FERC ¶ 63,055 (1979), Pet. App., pp. 23a-25a. Moreover, in light of KN's ample gas supply, the Commission accepted the filing of the plan on only a standby basis, to be available should KN suffer a gas supply deficiency at some future time. *See Kansas-Nebraska Natural Gas Co., Inc.*, 58 FPC 2890, 2892 (1977); 59 FPC 1776, 1780-81 (1977); *see also* Pet. App., p. 25a, n. 14. The Commission in those rulings expressly distinguished between KN's "filing" of a curtailment plan on a standby basis and KN's "implementation" of that plan, which never validly occurred. *Id.; see also Pacific Gas & Electric Co. v. Federal Power Commission*, 506 F.2d 33, 42 (D.C. Cir. 1974); *Hercules Inc. v. Federal Power Commission*, 552 F.2d 74, 87-88 (3rd Cir. 1977) (both holding that a curtailment plan cannot serve to override inconsistent contractual obligations until the gas company is experiencing curtailment and its curtailment plan has been approved by the Commission); 6 FERC ¶ 63,055 at 65,320 (1979) (distinguishing between "interrupting" service where there is an adequate gas supply but not enough pipeline capacity, which was the situation faced by KN, and "curtailing" service because of inadequate gas supplies, which KN never did).

tives affecting KN's service to GW. The power to issue a directive has never carried with it, without more, the exclusive power to interpret it. *See United States v. Western Pacific R. Co.*, 352 U.S. 59, 65-66 (1956); *Great Northern Ry. Co. v. Merchant's Elevator Co.*, 259 U.S. 285 (1922) (both holding that courts are competent to interpret an agency's directives when the issues do not involve the agency's special expertise and involve solely questions of law). That is because the issuance of a law or directive, *i.e.*, a legislative function, has historically been considered different from the interpretation of it, *i.e.*, an adjudicative function. *Cf. Brown* v. *Gerdes*, 321 U.S. 178, 188 (1944) (Frankfurter, J., concurring).[16]

Thus, although *Louisiana Power & Light* held that the Natural Gas Act gave the Commission jurisdiction to devise curtailment plans, such jurisdiction is not so broad as to be primary or exclusive in the sense that, in the absence of curtailment, it ousts a *court* of jurisdiction to entertain a damage action for breach of contract.

II. The Colorado Courts Properly Refused To Refer Any Issue To The Commission.

A. The Doctrine of Primary Jurisdiction Does Not Assist KN.

Although KN speaks in terms of the Commission's "exclusive jurisdiction", it argues (Pet., p. 17) that certain issues

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[16]Moreover, the fact that a federal regulation overrides a conflicting state regulation under the Supremacy Clause (as this Court held in *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507 (1947), relied on by KN (Pet., pp. 13-14)) does not deprive the state courts of jurisdiction. It simply means the state courts must apply the federal directive in resolving the dispute. *See Testa v. Katt*, 330 U.S. 386 (1947) (state courts obligated to enforce federal law).

"ought to have been referred to the agency", thereby suggesting that it is actually relying on the doctrine of primary jurisdiction. But since that latter doctrine is premised upon the notion that GW's contract claim is "originally cognizable in the courts", *United States v. Western Pacific R. Co.*, 352 U.S. 59, 64 (1956), KN's reliance on that doctrine undercuts its contention that the Commission has "exclusive jurisdiction" over this dispute.

KN argues (Pet., pp. 17-18) that the Colorado courts used a "mistaken approach" of inquiring into whether the Commission's directives were "inconsistent" with KN's contract obligations. According to KN, a correct approach—and the one which the Commission would presumably use if the matter were referred to it[17]—is to inquire whether the Commission's directives merely permitted the storage withdrawal interruption policy. In fact, it is KN's approach, not that of the Colorado courts, which is "mistaken": this Court has consistently held that a regulated company cannot abrogate its common law and other obligations merely by complying with a regulatory directive where compliance is not required or where the company could have avoided the directive's issuance or effect. *E.g., W. R. Grace and Co. v. Local Union 759*, 461 U.S. 757 (1983) (conciliation agreement with EEOC does not abrogate an employer's contractual obligations under a collective bargaining agreement); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) (tariff which obligates public utility to distribute free light bulbs does not exempt the utility from antitrust liability where utility was actively involved in drafting tariff);

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[17]Unfortunately for KN, the Commission's Administrative Law Judge presiding over the pending declaratory judgment proceeding, in rejecting all of KN's substantive contentions, *see* n. *13*, *supra*, analyzed these issues in the same "mistaken" way as did the Colorado courts. *See* 30 FERC ¶ 63,049 (1985).

United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956) (gas company cannot abrogate contractual obligations by unilaterally filing inconsistent tariff provision); *Regents of University System of Georgia v. Carroll*, 338 U.S. 586 (1950) (FCC licensee who repudiates a contract at the specific behest of Commission as a prerequisite to obtaining renewal of broadcasting license is still liable for contract breach).

The division of court and agency responsibility, which the doctrine of primary jurisdiction is designed to foster, is graphically illustrated in *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976). Noting that the plaintiff was seeking to recover damages incurred as a result of an airline's failure to disclose its overbooking practices, this Court set aside an agency referral directed by the Court of Appeals, finding that none of the issues involved related to the reasonableness of the airline practices and, therefore, the issues involved were within the conventional competence of the courts. *Id.*, at 305-6.

Here as well, no agency input was needed to resolve the issues involved. GW's complaint in the Colorado litigation was that KN had breached its contracts by unilaterally switching the basis on which it interrupted service to GW. There was no question presented as to the reasonableness of KN's underlying obligations. To the contrary, the basic question presented involved construction of the contract language dealing with interruption of service. Indeed, GW was directed to the courts by the Administrative Law Judge in RP76-90 to resolve this very issue.

Likewise, agency input was not *required* by the fact that KN invoked various Commission directives by way of defense. Again, whatever the Commission's jurisdiction may be with regard to the promulgation or reasonableness of

such agency directives, the questions here, as KN admits (Pet., p. 17), related solely to their interpretation and applicability to the instant situation as a legal matter. Here, as in *Nader*, the Colorado courts were competent to decide these questions without agency assistance.

B. None of the Commission Materials Relied On By KN Operated To Relieve It Of Its Contract Obligations To GW.

KN claims (Pet., pp. 17-24) that its storage withdrawal interruption policy was proper in light of certain of the Commission's orders and certificates, as well as KN's tariffs. Even if those directives authorized that policy—and it is clear that they do not as discussed below—they do not protect KN under the facts of this case. The "orders" were by their own terms non-binding statements of general policy;[18] the certificates—the issuance of which KN actively obtained—could not protect KN since, under the Natural Gas Act, the Commission has "no authority" to issue a certificate "when to do so would impair [the gas company's] ability to render adequate service to its customers", 15 U.S.C. § 717f(a); and the courts specifically found that the tariffs were consistent with the contracts and in any case did not override the contracts because they were filed unilaterally, Pet., App., pp. 22a-24a. *See United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), factual findings which KN does not contest.

KN's argument (Pet., pp. 3, 17-24) that the holdings of the Colorado courts conflicted with its obligations under the Natural Gas Act does not withstand a review of the Commission directives that KN cites.

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[18]*See* Order No. 431, 45 FPC 570 (1971); Order No. 498, 50 FPC 1954 (1973); *see also Pacific Gas & Electric Co. v. Federal Power Commission*, 506 F.2d 33, 35-38 (D.C. Cir. 1974) (discussing the non-binding nature of these general statements of policy).

1. *Commission Certificates Issued To KN*: KN contends (Pet., pp. 15, 18) that the holdings of Colorado courts in effect convert its interruptible service to GW to firm service and therefore violate the condition, in the certificate issued by the Commission for service to GW's Ovid plant, prohibiting firm service to interruptible customers without further Commission authorization.

But in so arguing, KN misstates the rulings of the Colorado courts. As noted by the Colorado Supreme Court (Pet. App., p. 16a):

> The dispute in the case focuses not on whether the contract permits interruptible service but rather on the manner in which interruptions are to be implemented.

In other words, prior to the adoption of the storage withdrawal interruption policy, KN provided service to GW's plants under the historical 24 to 36 hour analysis which resulted in only infrequent interruptions. A finding that the greatly increased interruption resulting under that new policy constituted a breach of contract is directed only to the extent of the interruptions, and does not convert interruptible to firm service.

KN also argues (Pet., p. 19) that the Commission issued certificates for storage fields to enable KN to serve firm customers and therefore the gas from these fields could not legally be used to serve interruptible customers. But prior to KN's adoption of the storage withdrawal interruption policy in 1973, KN had, in the normal course and without suggesting any impropriety, withdrawn gas from storage as needed to serve interruptible customers. Not only is there no suggestion in any certificate that the interruptible customers are not to be served by the certificated facilities, but, as discussed above, the Natural Gas Act precludes the

Commission from issuing certificates that result in dramatically reduced service (such as resulted from the storage withdrawal interruption policy, *see* p. 4, *supra*) to existing customers.

Finally, KN urges (Pet., p. 19) that the Commission certificate issued for the Big Springs Storage Field had indicated that the field was needed to help KN meet its future peak requirements. But such purpose is not inconsistent with serving interruptible customers out of storage when the gas is available—in contrast to the flat prohibition against such service mandated by the storage withdrawal interruption policy.[19]

2. *Commission Policy Statements*: KN invokes (Pet., p. 20) two statements of general policy issued by the Commission, Order No. 431, 45 FPC 570 (1971), and Order No. 498, 50 FPC 1954 (1973). The plain language of these policy statements rebuts any suggestion that they authorized or required KN's unilateral adoption of the storage withdrawal interruption policy. The policy statements were addressed to gas companies experiencing severe gas supply shortages, not KN. *See* pp. 11-12, *supra*. By their own terms, the policy statements were not binding; did not require gas companies to take any specific action; and certainly did not require them to breach their contracts or unilaterally change their contractual performance. Indeed, Order No.

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[19]As the Colorado Supreme Court pointed out (Pet. App., p. 17a), in interpreting the certificate's plain language as a matter of law, the Commission's comment on the storage withdrawal interruption policy in its Big Springs orders (also referred to by KN (Pet., p. 19)), "merely recognized KN's unilaterally-imposed policy and was not made a condition to the issuance of [that] certificate."

431[20] provided that gas companies facing supply shortages should file tariff sheets setting out proposed curtailment plans which, "*if approved by the Commission*, will control in all respects notwithstanding inconsistent provisions in sales contracts." 45 FPC at 572 (emphasis supplied). And Order No. 498 merely "requested" that pipelines "consider" taking certain actions "where possible," 50 FPC at 1957, language emphasizing the purely advisory character of the Order.[21]

3. *KN's Tariffs*: The Colorado courts ruled that KN's tariffs filed in 1975 and 1976 did not immunize KN from liability for two independent reasons. One reason was that under the plain language of the tariffs, KN was free to serve interruptible customers even while withdrawing gas from storage. Thus, since there was no conflict between the tariffs' plain language and KN's contractual obligations, the tariffs could not serve as a defense. Pet. App., pp. 20a-25a. KN does not question this ruling, which serves as an independent reason for upholding the Colorado courts' conclusion.

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[20]Order No. 431 was issued in April 1971, 2½ years before the adoption of the storage withdrawal interruption policy, during which time KN continued to operate under the historical 24 to 36 hour analysis. And Order No. 498, issued in December 1973, after KN unilaterally adopted that policy, hardly constitutes a Commission requirement that the policy be adopted.

[21]KN also relied below on Order No. 467B, 49 FPC 583, 584 (1973) (Pet. App., pp. 19a-20a, 45a). That Order destroys KN's position here, for it recognizes that a gas company which cuts back on service to its customers—without first being in curtailment and operating under a Commission-approved curtailment plan—does so at the "risk of civil liability." As discussed at pp. 11-12 *supra*, KN was never in curtailment during the relevant time period and never operated under an approved curtailment plan.

Instead, KN attacks only the Colorado courts' alternative holding that *if* the tariff[22] were somehow inconsistent with KN's contract obligations to GW, the unilateral nature of its filing would not cause an abrogation of KN's contractual obligations under the *Mobile-Sierra* doctrine.[23] Even here, KN does not question the validity of the courts' factual conclusion (Pet. App., pp. 22a-24a) that the tariff was filed unilaterally. Instead, it contends (Pet. pp. 23-24) only that GW did not raise this argument in the Commission proceedings in RP76-90, and therefore that GW had failed to exhaust its administrative remedies.

But in so arguing, KN improperly assumes that the tariff mandated the storage withdrawal interruption policy—an assumption belied by the Colorado courts' primary holding not questioned by KN here. Moreover, KN ignores the fact that it was KN, not GW, which lost before the ALJ in RP76-90: the ALJ there had held *KN's* tariff invalid and had ruled that *KN* had acted discriminatorily and contrary to its obligations under the Natural Gas Act, *Kansas-Nebraska Natural Gas Co., Inc.*, 6 FERC ¶ 63,055 (1979); and it was *KN* which failed there to challenge the ALJ's finding (even though it seeks to do so here) that issues concerning the storage withdrawal interruption policy should be resolved in the courts. Thus, it was KN, rather than GW, which was in a position of having to exhaust administrative remedies.

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[22]KN's tariff argument relates to the period after March 14, 1976, when the 1975 tariff was accepted for filing. Prior to that time, KN admittedly had operated under the storage withdrawal interruption policy without any contract amendment or Commission approval. *See* pp. 3-4 *supra*.

[23]*United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

Accordingly, if anyone failed to exhaust its administrative remedies, it was KN.[24]

III. A Damage Award For Breach Of Contract Neither Results In An Unlawful Undue Preference Nor Violates The Filed Rate Doctrine.

KN's argument that the Colorado courts violated the filed rate doctrine is raised untimely. KN did not bring that argument to the attention of the Colorado trial court.[25] Under then-existing Colorado procedure, KN had no authority to assert that argument before the Colorado Supreme Court. Rule 59(f), Colo.R.Civ.P. (repealed in 1985).[26]

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[24]KN's argument also assumes that GW had some administrative "remedy" that it needed to "exhaust". In the courts, GW sought the award of damages for KN's breach of contract during the period 1973-79, a remedy which the Commission has no power to award, particularly for the period before March 1976 when KN's tariff took effect. *See* n.22, *supra*.

[25]KN also did not bring this argument to the attention of the Colorado Court of Appeals.

[26]Former Rule 59(f), Colo.R.Civ.P., states:

No Review Unless Made. The party claiming error in the trial of any case (except as provided in section (h) of this Rule) must move the trial court for a new trial as herein above provided, and the trial court may not dispense with the necessity for filing such a motion but may dispense with oral argument on the motion after it is filed, and only questions presented in such motion will be considered by the appellate court on review; provided, however, that if a motion to alter or amend the judgment is filed it shall, for appellate purpose, be considered as a motion for a new trial.

Rule 59(h), Colo.R.Civ.P., which is referred to in Rule 59(f), states:

When Motion Not Necessary. When final judgment is entered pursuant to motion filed under the grounds stated in Rule 12(b)(1) to (6), inclusive, or after hearing on motion filed pursuant to Rule 12(c) or 56; or after pretrial conference, or after any hearing not involving

Review of this issue is thus barred on an independent state ground.

Contrary to KN's argument (Pet., pp. 25-27), awarding damages to GW for KN's breach of contract does not result in an undue preference or advantage prohibited by Section 4(b) of the Natural Gas Act. 15 U.S.C. § 717c(b). Not only would this argument, if valid, in effect wipe out the courts' jurisdiction to make damage awards in breach of contract actions in situations such as here involved,[27] but it assumes that GW alone of all interruptible customers would be entitled to an award of damages. Although GW is the only customer who has brought suit, there is nothing blocking other interruptible customers similarly situated from also bringing suit against KN and recovering appropriate damages.

Nor does awarding GW damages for breach of contract under these facts violate the filed rate doctrine. GW does not question the rate charged for gas delivered to it. GW's complaint is that KN breached its contract by not delivering gas. GW's damages were, in fact, measured as the difference in cost between operating its factories with fuel oil and with natural gas, and its cost of operating with natural gas was measured as "the price [of] natural gas under the con-

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controverted issues of fact; the party claiming error may appeal without the necessity of filing a motion for a new trial or a motion to alter or amend a judgment.

Not only did KN fail to make any argument under the filed rate doctrine in any post-trial motion directed to the trial court, but it also failed to raise an argument under that doctrine in its motion for summary judgment or in its response to GW's summary judgment motion.

[27]Indeed, when KN was a plaintiff in a breach of contract lawsuit, *i.e.*, its suit against Pan American, it sought and obtained damages. *See* 297 F.2d at 564-65.

tracts." Pet. App., p. 35a. In other words, GW's damages were premised upon the validity of the price for gas, *i.e.*, the filed rate, which KN charged GW. GW, in fact, accepted the filed rate without question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May, 1985

APPENDIX

APPENDIX

In compliance with Rule 28.1, Counsel for Respondent, The Great Western Sugar Company, state that GW is now the debtor in possession in a Chapter 11 proceeding under the Bankruptcy Act instituted in March 1985. The following list includes all parent companies, subsidiaries, and affiliates of GW:

Planet Investment Corporation
  Keep Corporation
Hunt International Resources Corporation
  Great Western United Corporation
    Great Western Cities, Inc. of New Mexico
      Great Western Cities Realty
    California City Development Company
      Great Western Cities, Inc.
        California City Realty Company
        Borden Valley Water Development Company
        Western Cities Hotels, Inc.
      Great Western United Properties, Inc.
    Colorado City Development Company
      Colorado City Realty Company
      Great Western Cities Realty Company
  Boron Royalty Corporation
  GWS International Trading Company
  Hunt International Coal & Trading
  Crescent Home Export Company
  The Great Western Sugar Company
    Great Western Sugar Export Company
    Northern Ohio Sugar Company
    Godchaux-Henderson Sugar Co., Inc.
    The Great Western Railway Company
    Sierra White Sugar Company
    Bighorn Limestone Company
  Offshore Investment Limited

Pillar Drilling
Impel Energy Corporation
Western Energy Land Company
Western Energy Coal Company
Energy Equipment Corporation
Carver Tipple Corporation
Impel New Zealand, Ltd.
Oakdale Tipple Corporation
Shakey's Inc.
Shakey's International Ltd.
Shakey's National Advertising Fund, Inc.
Shakey's Pizza Parlor Company, Inc.
Shakey's of Texas, Inc.
Shakey's New York Pizza, Inc.
Sheridan Pizza Parlor, Inc.
Wyoming No. 1
Wyoming No. 2
Wyoming No. 3
Wyoming No. 4
Hunt Electronic Company
OSB, Inc.